



The Commonwealth of Massachusetts

**DEPARTMENT OF
TELECOMMUNICATIONS AND ENERGY**

D.T.E. 04-72

April 22, 2005

Petition by the Massachusetts Municipal Association Requesting an Investigation by the Department of Telecommunications and Energy of Whistle Bans at Highway/Railroad Grade Crossings in Effect within the Massachusetts Bay Transportation Authority Commuter Rail District.

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FOR: MASSACHUSETTS MUNICIPAL ASSOCIATION
Petitioner

I. INTRODUCTION

On July 22, 2004, the Massachusetts Municipal Association (“MMA”) filed a petition (“Petition”) with the Department of Telecommunications and Energy (“Department”) asking the Department to maintain train whistle bans in specific communities within the Massachusetts Bay Transportation Authority (“MBTA”) commuter rail district.¹ The Department docketed the matter as D.T.E. 04-72. Pursuant to notice duly issued, the Department sought comment on MMA's Petition. In response, the Department received a letter from the City of Revere in support of MMA's Petition. The evidentiary record consists of two exhibits.²

II. DEPARTMENT JURISDICTION OVER THE ESTABLISHMENT OF WHISTLE BANS

Pursuant to G.L. c. 160, § 139, the Department may forbid or regulate the sounding of whistles at any specified crossing. Absent such an Order by the Department, or legislation providing for town-wide whistle bans, G.L. c. 160, § 138 requires that a locomotive approaching a crossing sound three separate and distinct whistle blasts starting at a distance marked by a whistle post, or at least eighty rods (approximately one-quarter mile) from the crossing and continuing until the locomotive has traveled over the crossing.

¹ Ayer, Belmont, Beverly, Chelsea, Everett, Gloucester, Hamilton, Ipswich, Lincoln, Manchester-by-the Sea, Medford, Melrose, Newburyport, Norfolk, Reading, Revere, Somerville, Wakefield, Waltham, Wenham, and Weston.

² On our own motion, the Department moves into evidence the following documents: Exhibit A (Railroad/Highway Diagnostic Team Checklist); and Exhibit B (Quiet Zone Calculator Data).

In accordance with provisions of the Swift Rail Development Act of 1994, the Federal Railroad Administration (“FRA”) has established a uniform standard of review for communities seeking relief from train horns. On December 18, 2003, the FRA promulgated its Interim Final Rule (“Rule”). 49 C.F.R. Parts 222 and 229. On June 26, 2005, the FRA is expected to publish its Final Rule.³ After publication of the Final Rule, states will be preempted from either recognizing or creating new Quiet Zones (“QZ”) (*i.e.*, crossings where whistle bans are or will be established). Rule at § 222.7. As of that date, a city/town must apply directly to the FRA to establish a new QZ or gain approval of a Pre-Rule QZ. Until then, the sounding of locomotive horns remains subject to applicable state and local laws. Given the imminent transition from state to federal regulatory authority over train whistles, the Department evaluated the MMA’s petition using the federal standard of review.

III. DESCRIPTION OF INVESTIGATION

In its investigation, the Department reviewed 68 public highway/railroad grade crossings in 17 cities and towns within Massachusetts.⁴ In investigating whether to reaffirm

³ U.S. Department of Transportation Report on DOT Significant Rulemakings (March 2, 2005), Whistle Bans at Highway-Rail Grade Crossings, available at <http://regs.dot.gov/rulemakings/200503/fra.htm>.

⁴ Initially, the MMA requested that the Department investigate 80 highway/railroad grade crossings in 21 cities/towns (Petition at App. A). However, pursuant to G.L. c. 160, § 139, only 68 such crossings were public and, therefore, under the Department’s jurisdiction. Also, although the Petition included the Town of Norfolk, the Norfolk whistle ban was determined to be granted pursuant to home rule legislation and thus it was not part of our review. Prior to the conclusion of the investigation, the City of Everett elected to restore the sounding of the train horn at its one public railroad/highway grade crossing. Moreover, the City of Revere’s railroad/highway

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whistle bans at the 68 highway/railroad grade crossings, the Department applied the FRA's Rule. For the purposes of the investigation, and per the Rule, each of these existing community whistle bans was treated as a Pre-Rule QZ. The FRA defines a Pre-Rule QZ as a segment of rail line within which is situated one or a number of consecutive public or private highway/rail grade crossings at which state statutes or local ordinances restricted the routine sounding of locomotive horns, or which locomotive horns did not sound due to formal or informal agreements between the community and the railroad, and such statutes, ordinances or agreements were in place and enforced or observed as of October 9, 1996 and on December 18, 2003. Rule at § 222.9; 68 Fed. Reg. 70,593.

Pursuant to the Rule, the Department evaluated a number of factors to determine whether the community QZ qualified as a Pre-Rule QZ. Such factors included: the number of trains passing over the crossing per day; the allowed train speed (according to the railroad operating rules book); the type of warning devices installed at each crossing (i.e., gates, flashing lights, bells, etc.); and the information provided by the cities/towns regarding the number of accidents that occurred at each crossing. See Rule at § 222.41; see also Railroad/Highway Diagnostic Team Checklist (Exh. A). The data collected by the Department

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grade crossing is listed in the FRA National Railroad Crossing data base as a private crossing. Last, it was determined during this investigation that the Town of Newburyport does not have a railroad/highway grade crossing. Thus a total of 17 communities were evaluated by the Department.

for each crossing in a QZ was then entered in the FRA Train Horn Calculator⁵ to determine if the community QZ would qualify as a Pre-Rule QZ according to the Rule (Exh. B).

IV. ANALYSIS AND FINDINGS

Based on the Department's application of the Rule and using the data provided by each community, we find that the 17 communities noted above qualify⁶ as Pre-Rule QZs. As such, the Department will permit those communities to maintain train whistle bans at their public highway/railroad crossings with certain exceptions discussed below.⁷

While the towns of Reading,⁸ Lincoln, Wakefield, and Ipswich qualify as Pre-Rule QZs, these towns will need to take remedial measures to retain whistle bans for their QZs when the Rule goes into effect. Rule at § 222.41(b).⁹ According to the Rule, a Pre-Rule QZ

⁵ The FRA created a "Quiet Zone Calculator" that allows the public authority/local community to input data pertaining to each crossing in a proposed new QZ or Pre-Rule QZ and to determine the level of risk present at the crossing absent the sounding of the train horn.

⁶ These communities include: Ayer, Belmont, Beverly, Chelsea, Gloucester, Hamilton, Ipswich, Lincoln, Manchester-by-the-Sea, Medford, Melrose, Reading, Somerville, Wakefield, Waltham, Wenham, and Weston.

⁷ Pursuant to the Rule at Section 222.41(a)(3), the Department's Order considers relevant collisions over the five-year period ending December 18, 2003. The Department is aware, however, of several accidents that occurred in the City of Beverly since that date. Those accidents are being investigated independently of this docket.

⁸ The data for the Town of Reading was incomplete because one of its crossings, New Crossing Road, was not listed in the FRA calculator. This crossing was missing from the FRA national database of highway/railroad grade crossings.

⁹ Reading, Lincoln, Wakefield, and Ipswich are considered Pre-Rule QZs under the Rule because (1) whistles bans were in place in these communities between October 9, 1996
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will be considered approved and may remain in effect if the Quiet Zone Risk Index (“QZRI”) is less than two times the Nationwide Significant Risk Threshold¹⁰ (“NSRT”) without any “relevant collision”¹¹ at the crossing in the QZ during the previous five years. Rule at § 222.41. Specific highway/railroad grade crossings in these four towns had QZRI values greater than twice the NSRT (see Exh. B). These crossings are: (1) Reading: Ash Street; (2) Lincoln: South Great Road, Lincoln Road, and Tower Road; (3) Wakefield: Chesnut Street and Prospect Street; and (4) Ipswich: Topsfield Road and Washington Street (id.). In addition, each of these towns had at least one relevant collision at each of these highway/railroad grade crossings (id.). Because each of these crossings have scores greater than the NSRT and have experienced at least one relevant collision per crossing, the Department finds that whistle bans at these specific crossings should be rescinded. Accordingly, train horn whistles shall be restored at these crossings.

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and December 18, 2003, and (2) these communities were listed in the Massachusetts Bay Commuter Railroad’s operating rule book. Rule at § 222.9; 68 Fed. Reg. 70,593.

¹⁰ The NSRT is a “number reflecting a measure of risk, calculated on a nationwide basis, which reflects the average level of risk to the motoring public at public highway-rail grade crossings equipped with flashing lights and gates and at which locomotive horns are sounded. [A] risk level above the NSRT represents a significant risk with respect to loss of life or serious personal injury.” Rule at § 222.9.

¹¹ “Relevant collision” is defined as a collision at a highway/railroad grade crossing between a train and a motor vehicle, excluding the following: a collision resulting from an activation failure of an active grade crossing warning system; a collision in which there is no driver in the motor vehicle; or a collision where the motor vehicle struck the side of the train beyond the fourth locomotive unit or rail car. Rule at § 222.9. The term “relevant collision” was included in the rule “to provide a basis for reviewing the safety history at a crossing while ensuring that collision not relevant to the direct issue of motorist decision-making are omitted from the analysis.” Id.

When the Rule takes effect, Reading, Lincoln, Wakefield, and Ipswich will need to implement Supplementary Safety Measures (“SSMs”) and/or Alternative Safety Measures (“ASMs”) at the above-noted highway/railroad grade crossings in order to retain Pre-Rule QZ status. Rule at § 222.41(b). SSMs are safety systems or procedures that are implemented by a city or town responsible for safety at the highway/railroad grade crossing. Rule at § 222.9.¹² ASMs are modified SSMs or non-engineering ASMs such as: planned enforcement, public education and awareness programs and the use of photo enforcement technology. See Rule at § 222, App. B; Rule at § 222.53. The Rule stipulates a number of factors that determine the actual amount of time a community has to reduce the risk level within a QZ.¹³ See e.g., Rule at § 222.41(2)-(4). Therefore, Reading, Lincoln, Wakefield, and Ipswich will need to review SSMs and ASMs provided for in the Rule to determine what measures are best suited to reduce their risk levels in the QZs. These towns will have to apply directly to the FRA for an exemption from the timing requirements of the Rule while they work to implement SSMs and ASMs. See Rule at § 222.39. In the meantime, the Department will not permit these communities to maintain whistle bans at the crossings discussed above.

In conclusion, after due notice, opportunity for comment, and consideration, the following towns meet the definition of Pre-Rule QZs: Town of Ayer; Town of Belmont; City

¹² Examples of SSMs include: four-quadrant gates; median dividers, which prevent drivers from crossing lanes to go around a lowered gate; the temporary closure of a crossing; and the conversion of two-way traffic into a one-way street with gates and lights. See Rule at § 222, App. A.

¹³ These include, but are not limited to, funding sources, planning, budgetary cycles, state assistance and the type of actions taken by the community. Rule at § 222.41.

of Beverly; City of Chelsea; City of Gloucester; Town of Hamilton; Town of Ipswich; Town of Lincoln; Town of Manchester-by-the-Sea; City of Medford; City of Melrose; Town of Reading; City of Somerville; Town of Wakefield; City of Waltham; Town of Wenham; and Town of Weston. However, each community must review the Final Rule and submit an application to the FRA after publication of the Final Rule in order to retain FRA approval as a Pre-Rule QZ. Further, the Towns of Reading, Lincoln, Wakefield, and Ipswich will have to implement the appropriate SSMs and ASMs consistent with the Final Rule to retain QZ status. In the interim and while under Department jurisdiction, whistle bans at: Ash Street in

Reading; South Great Road, Lincoln Road, and Tower Road in Lincoln; Chesnut Street and Prospect Street in Wakefield; and Topsfield Road and Washington Street in Ipswich are rescinded.

By Order of the Department,

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Paul G. Afonso, Chairman

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James Connelly, Commissioner

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W. Robert Keating, Commissioner

\s\

Judith F. Judson, Commissioner

\s\

Brian Paul Golden, Commissioner

An appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part. Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of the twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. G.L. c. 25, § 5.